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No. 06-1045

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and JON BRUNING, in his official capacity as Attorney General of Nebraska,

Petitioners,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN; HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS H. DAHLK
L. STEVEN GRASZ*
MICHAEL S. DEGAN
REBECCA B. GREGORY
BLACKWELL SANDERS PEPER MARTIN
1620 Dodge Street, Suite 2100
Omaha, NE 68102
(402) 964-5000

STEPHEN D. MOSSMAN
MATTSON, RICKETTS, DAVIES, STEWART, AND CALKINS
134 S. 13th Street, #1200
Lincoln, NE 68508
(402) 475-8433

DAVID A. JARECKE
CROSBY GUENZEL LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508-1981
(402) 434-7300

Counsel for Respondents
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly found that the Respondents had standing to challenge article XII, § 8 of the Nebraska Constitution under the Dormant Commerce Clause?

2. Whether article XII, § 8 of the Nebraska Constitution discriminates against interstate commerce in violation of the Dormant Commerce Clause of the United States Constitution?

3. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly applied Nebraska law regarding the severability of unconstitutional enactments?

4. Whether the Eighth Circuit Court of Appeals and the United States District Court for the District of Nebraska correctly applied federal procedural law concerning summary judgment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The Petitioners are Nebraska Secretary of State John Gale, in his official capacity, and Nebraska Attorney General Jon Bruning, in his official capacity. The Respondents are Jim Jones; Terrence M. Schumacher; Shad Dahlgren; Harold Rickertsen; Todd Ehler; and Robert E. Beck III.

The Respondents are individuals and have no parent corporations.

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CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 470 F.3d 1261 (8th Cir. 2006), and is reproduced in the Petitioners' Appendix at 1-18. The opinion of the United States District Court for the District of Nebraska is reported at 405 F. Supp. 2d 1066 (D. Neb. 2005), and is reproduced in the Petitioners' Appendix at 19-58.

STATEMENT OF THE CASE

On December 13, 2006, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Nebraska dated December 15, 2005, finding that article XII, § 8 of the Nebraska Constitution (known as "Initiative 300") violates the Commerce Clause of the United States Constitution. The Eighth Circuit found Initiative 300 to be unconstitutional as being both facially discriminatory against interstate commerce and as having been adopted with a discriminatory intent. *Jones v. Gale,* 470 F.3d 1261 (8th Cir. 2006). (Petitioners' Appendix at 16 (hereafter Pet. App.)).

The Respondents generally concur in the Petitioners' statement of the case with regard to the enactment of Initiative 300 and as to the description of the parties and litigation below.

SUMMARY OF THE ARGUMENT

The questions set forth by the Petitioners present no compelling basis for consideration by this Court and do not

merit review. It is undisputed that a nearly identical state constitutional provision was invalidated by the Eighth Circuit Court of Appeals in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), and that this Court denied certiorari in that case at 541 U.S. 1037 (2004). No Justices indicated dissent from the denial of certiorari. *Cf. South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, Circuit Justice, denying request for stay) ("The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari.").

Petitioners' questions one, three and four assert misapplication by the Eighth Circuit Court of Appeals of properly stated rules of law regarding standing, severability and summary judgment, respectively. Petitioners' second question concerning the constitutionality of Initiative 300 under the Dormant Commerce Clause also alleges misapplication of the law. No split exists among the Circuit Courts of Appeal as to the question presented, nor is there any conflict with a state court of last resort or any relevant decision of this Court. The Petitioners simply disagree with the Eighth Circuit's decision as to whether Initiative 300 discriminates against interstate commerce. Consequently, none of the questions presented merit review by this Court, and the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. Petitioners' First Question Asserts Only a Misapplication of a Properly Stated Rule of Law and Does Not Merit Review.

Pursuant to Supreme Court Rule 10 "[a] petition for a writ of certiorari will be granted only for compelling reasons." Petitioners' first question presents no compelling reason for review. It is merely a complaint that the United States District Court for the District of Nebraska and a unanimous panel of the Eighth Circuit Court of Appeals allegedly incorrectly determined that the Respondents had standing to challenge article XII, § 8 of the Nebraska Constitution as a violation of the Dormant Commerce Clause. The Petitioners assert the Eighth Circuit's holding "is contrary to the standard articulated by this Court for determining whether a party has standing to bring a Commerce Clause claim." (Pet. at 6) However, as Supreme Court Rule 10 notes, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

Moreover, the Eighth Circuit, like the District Court below, carefully and thoroughly considered the standing of the Respondents, and correctly concluded the court had jurisdiction. (Pet. App. 28-35; Pet. App. 6-9) (applying *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)). The Petitioners repeatedly assail the standing of Respondents Schumacher and Beck. (Pet. 1, 8, 9) However, standing of the four other Respondents is not seriously questioned. Thus, even if the Court were to re-adjudicate the standing of two of the Respondents, there would be no change in the outcome of the case, as the lower courts would still be found to have had jurisdiction. *Bowan v. Kendrick*, 487 U.S. 589, 620 n.15 (1988). The Eighth

Circuit specifically noted this fact: "Although the district court concluded that all of the plaintiffs had standing to bring the commerce clause claim, we have said previously that 'where one plaintiff establishes standing to sue, the standing of other plaintiffs is immaterial' to jurisdiction." (Pet. App. 6) (citations omitted). Thus, Petitioners' first question does not merit review.

II. Petitioners' Second Question Asks this Court to Review a Circuit Court Decision Where No Conflict Exists with Another Circuit Court or State Court of Last Resort or with any Relevant Decision of this Court.

The United States Court of Appeals for the Eighth Circuit, without dissent, held that article XII, § 8 of the Nebraska Constitution "discriminates against out-of-state entities both on its face and because of its discriminatory intent." (Pet. App. 15) Petitioners' second question asks this Court to review that conclusion. (Pet. 11)

While the Petitioners may certainly seek this Court's review of an alleged misapplication of the law, such is rarely the basis for granting a petition for writ of certiorari. (*See* Supreme Court Rule 10). This is especially true where, as here, there is no split among the Circuit Courts of Appeal as to the question presented, nor any conflict with a state court of last resort or any relevant decision of this Court. *Id.* The Petitioners simply disagree with the Eighth Circuit's decision as to whether the state law in question discriminates against interstate commence. The Petitioners also assert the novel argument that certiorari should be granted because the Eighth Circuit's decision in this case allegedly conflicts with an earlier Eighth Circuit decision. (Pet. 18) However, no *en banc* review was sought

by the Petitioners in the Circuit Court, and it cannot be presumed the Eighth Circuit is unmindful of its own decisions, especially those briefed, cited and discussed in this very case. (*See* Pet. App. 46)

Significantly, it is undisputed that a substantially identical state constitutional provision was invalidated by the Eighth Circuit Court of Appeals in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), and that this Court denied certiorari in that case at 541 U.S. 1037 (2004). No Justices indicated dissent from the denial of certiorari. *See South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, Circuit Justice) ("The issues presented by applicants are almost identical to those presented three years ago, when the Court voted to deny certiorari."). Also noteworthy is the fact that on February 8, 2007, Justice Alito denied the Petitioners' application for a stay, apparently concluding the Petition herein fails to meet the applicable criteria. *See Edwards v. Hope Medical Group For Women*, 512 U.S. 1301, 1302 (1994) (Scalia, Circuit Justice, addressing a request for stay and setting forth the three criteria, including likelihood of review). Thus, question two presents no compelling reason for granting the Petition, and does not merit review.

III. Petitioners' Third Question Merely Asserts the Eighth Circuit Misapplied Nebraska Law Regarding Severability of Unconstitutional Provisions and Does Not Merit Review.

In their third question Petitioners seem to imply that a conflict exists between the Eighth Circuit and the Nebraska Supreme Court with regard to the law governing severability of unconstitutional provisions. (Pet. 19)

However, that is clearly not the case. The Eighth Circuit expressly acknowledged the applicability of Nebraska severability law, citing the same Nebraska cases as the Petitioners. (Pet. App. 17) The Eighth Circuit then applied this Nebraska law and concluded that "a severance would not satisfy the conditions that the Nebraska Supreme Court has outlined for a severance." (*Id.*) "We thus have no other option than to affirm the district court's judgment and hold that the entire amendment . . . is unconstitutional." (*Id.*)

Thus, Petitioners' third question presents nothing more than an assertion that the Eighth Circuit misapplied a properly stated rule of law, and does not merit review. (*See* Supreme Court Rule 10).

IV. Petitioners' Fourth Question Alleges Misapplication of the Standard for Disposition of a Case by Summary Judgment and Presents No Compelling Reason for Review.

In connection with its final question, the Petitioners assert "the Circuit Court misapplied this Court's summary judgment standard in ruling that this case could be decided on summary judgment." (Pet. 22) This argument is particularly novel in that, as the Eighth Circuit noted in its decision, "all parties moved for summary judgment." (Pet. App. 3) In addition, a substantially identical state constitutional provision was previously invalidated in *South Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583 (8th Cir. 2003), *cert. denied*, 541 U.S. 1037 (2004). Thus, the Petitioners' assertion that the case was not appropriate for disposition by summary judgment is without merit. Furthermore, the Circuit Court has not "decided an important federal question in a way that

conflicts with relevant decisions of this Court." (Supreme Court Rule 10). Rather, the Petitioners once again merely assert a misapplication of a properly stated rule of law – in this instance the rules for summary judgment. Accordingly, Petitioners' question four does not merit review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 1st day of March, 2007.

THOMAS H. DAHLK
L. STEVEN GRASZ*
MICHAEL S. DEGAN
REBECCA B. GREGORY
BLACKWELL SANDERS PEPER MARTIN
1620 Dodge Street, Suite 2100
Omaha, NE 68102
Telephone: (402) 964-5000

DAVID A. JARECKE
CROSBY GUENZEL LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508-1981
Telephone: (402) 434-7300

STEPHEN D. MOSSMAN
MATTSON, RICKETTS, DAVIES, STEWART, AND CALKINS
134 S. 13th Street, #1200
Lincoln, NE 68508
Telephone: (402) 475-8433

Counsel for Respondents Jim Jones, Terrence M. Schumacher; Harold G. Rickertsen; Todd Ehler; Robert E. Beck III, and Shad Dahlgren

* *Counsel of Record*